

NTSB Order No. EA-4537

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of March, 1997

Respondent.

OPINION AND ORDER

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pilot certificate,² upon finding that respondent had violated 14 C.F.R. 91.130(c)(1), and 91.13(a).³ The law judge, however, reduced the Administrator's proposed suspension from 30 to 5 days. Both parties have replied to each other's appeal. We deny both appeals.

In the afternoon of February 22, 1995, respondent flew in a Beechcraft Model B45 from Edwards Air Force base to Ontario, CA. The aircraft entered Class C airspace at Ontario, CA, at an altitude of approximately 1700 feet without establishing or maintaining two-way radio contact with air traffic control (ATC), and the Beechcraft converged to a point of only zero feet lateral and 600 feet vertical separation with a United Airlines flight on approach to the Ontario airport, causing the United flight to effect a go-around. Respondent was operating the controls at the

²On page 150 of the transcript, the law judge erroneously referred to suspending respondent's private pilot certificate.

³Section 91.130(c)(1) reads:

(c) Communications. Each person operating an aircraft in Class C airspace must meet the following two-way radio communications requirements:

(1) Arrival or through flight. Each person must establish two-way radio communications with the ATC facility (including foreign ATC in the case of foreign airspace designated in the United States) providing air traffic services prior to entering that airspace and thereafter maintain those communications while in that airspace.

Section 91.13(a) provides that "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

time. Respondent, however, claims that he did not begin to pilot the aircraft until the violation had been committed or was impossible to prevent and, therefore, that because it was impossible for him to do or refrain from doing anything to prevent the violation, it is error to assign it to him. Although the law judge affirmed the violation, his reduction of the suspension period and the accompanying discussion in the initial decision reflect his opinion that, in effect, respondent had no choice in the circumstances.⁴

Respondent's argument is not without merit, but we believe that respondent, as an airline transport pilot held to the highest degree of care, must accept some responsibility for the events. We understand that respondent was in the aircraft on a short-notice request, having been asked to come by another pilot, Mr. Botbyl, only so that respondent could pilot the aircraft on the return flight while Mr. Botbyl returned with another aircraft. According to respondent, as they neared Ontario, the weather started closing in. They discussed landing, but decided to proceed instead, and they descended under the clouds to maintain visual flight rules flight. Mr. Botbyl directed respondent to take the controls, while the former studied

⁴The law judge found that respondent "was unknowingly placed in a position where he became an operator of this aircraft" and that "this was a circumstance in which the Respondent had no intention of getting into, finds himself totally, unexpectedly in this position as operator, and that to satisfy the public interest in air safety and [sic; should be "in"] air commerce" a 5 day suspension is sufficient. Tr. at 158.

navigation charts and gave respondent directions.⁵

Although, assuming respondent's version of events is the true one, we would generally agree with the law judge's view that the situation was not of respondent's making, we also are of the view that, whether respondent took the controls before or after the aircraft entered Class C airspace (and regardless of the reasons he took them), he then took none of the actions that we would expect of an ATP certificate holder in the circumstances.

Respondent believed that he was not in Class C airspace. But, testimony from the FAA Air Safety Inspector who investigated the incident indicates that respondent was using charts on two different scales, thus producing locational confusion. Tr. at 40. Once he took the controls, even in this difficult situation, respondent incurred some measure of responsibility for the safety of the aircraft, its passenger, and others flying in the vicinity. By his own testimony, he did not decline to take the controls, did not urge the other pilot to contact ATC (he could not do so from the rear seat of this aircraft), did not suggest they land at a closer airport to determine their location before proceeding, nor does it appear that he was even aware of the aircraft's location (other than in a general sense, believing that they were through Cajon Pass) or the location of Class C

⁵Mr. Botbyl testified to a somewhat different set of events, namely that it was respondent's idea to continue the flight and that he, instead, wanted to land sooner as the weather was turning unfavorable. Respondent, as noted, contradicted that testimony and, although the law judge did not make a specific credibility finding, it appears he accepted respondent's version of events.

airspace. Overall, we are not unmindful of what might appear an abnormally harsh result in this case. However, in our view, dismissing the Administrator's complaint and order would be equivalent to finding that respondent had **no** responsibility for the aircraft when he was piloting it. We will not so find.

By the same token, we deny the Administrator's request that we reinstate the proposed 30-day suspension. The Administrator argues that both precedent and his sanction guidance table require at least a 30-day suspension, and that we are compelled to adhere to guidance in that table.

Had the sanction guidance table been offered before the law judge we might agree that we were bound to impose the minimum 30 days. The table may well be validly adopted written policy guidance to which we owe deference, but we need not decide this point. As the court in Hinson v. NTSB and Richard A. Rolund (57 F.3d 1144 (D.C. Cir. 1995)) held, if the Administrator wishes the Board to defer to his validly adopted written sanction policy, it is the Administrator's obligation explicitly and timely to raise the deference argument. The law judge cannot be expected to abide by valid sanction guidelines if he is not advised of them, and nowhere in the transcript, before or after the judge's ruling, is there any mention by counsel for the Administrator of the basis for the proposed sanction. Although the situation here is not identical to that of Rolund, where the Administrator raised the issue before the court but had not done so before the Board, the same reasons of administrative efficiency that led to

the long-standing judicial precedent applied by the court in Rolund compel the same conclusion here. We would be promoting extreme inefficiency in the process, to say the least, were we to allow the Administrator to plead (and succeed on) this issue for the first time at the appellate level, having no obligation to plead it before the law judge.

Furthermore, the Administrator's citations to cases he believes support a 30-day suspension do not, in our opinion, do so. Few of the facts in those cases are discussed in the Administrator's appeal. And, we are aware of no case with facts similar to the unusual situation before us here. Although we may not have chosen the 5-day suspension ordered by the law judge, we cannot find, and the Administrator has not shown, that he abused his discretion in this regard.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's appeal is denied; and
3. The 5-day suspension of respondent's pilot certificate shall begin 30 days from the service of this order.⁶

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

⁶For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(f).